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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 789

LOCAL 2 of the OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION, etc., *et al.*,

Petitioners,

vs.

PARAMOUNT PLASTERING, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

ARGUMENT.

Introduction.

All of the legal issues involved in the instant case were adequately determined by the courts below and by prior decisions of the Supreme Court and other Courts of Appeals. There is no conflict among the circuits. For those reasons, review by the Supreme Court is not warranted.

I.

The Court Below Correctly Decided That a Trade Promotion Fund Is Prohibited by Section 302 of the Labor Management Relations Act.

Section 302 of the Labor Management Relations Act as amended, 29 U. S. C. 186, contains a broad prohibition against payments of anything of value by an employer to a representative of his employees. That limitation is qualified by specified exceptions. Petitioners claim that the specified exceptions are not exclusive.

It is clear however from decisions of the Supreme Court and of the Courts of Appeals that the only purposes for which funds can be created are those set forth in the statute. The language of the statute is clear and unambiguous, and therefore there is no room for interpretation nor for judicial policy-making.

Cf.:

United States v. Associated Press (1943), 52 Fed. Supp. 362, 370.

Section 302, according to its legislative history, was enacted to prevent *possible* abuse and was not aimed at remedying evil actually perpetrated.

Employing Plasterers' Association of Chicago v. Journeymen Plasterers' Protective & Benevolent Society of Chicago (7 Cir. 1960), 279 F. 2d 92, 97.

Nor was the prohibition of Section 302 directed solely at welfare funds as contended by Petitioners. The statute contains a broad proscription against all exchanges moving from an employer to representatives of his employees. If not, the purpose of Section 302 could

easily be evaded by entitling a fund something other than "welfare fund."

In *United States v. Ryan* (1956), 350 U. S. 299, 305, it was declared:

> "Nor can it be contended that in this legislation, Congress was aiming solely at the welfare fund problem. Such a suggestion is supported neither by the legislative history nor the structure of the section. The arrangement of Section 302 is such that the only reference to welfare funds is contained in Section 302 (c) (5). If Congress intended to deal with that problem alone it could have done so directly, without writing a broad prohibition in subsections (a) and (b) and five specific exceptions thereto in subsection (c), only the last of which covers welfare funds. As the statute reads it appears to be a criminal provision, *malum prohibitum*, which outlaws all payments, with stated exceptions between employer and representative."

That Section 302 contains a broad prohibition with only limited exceptions is further evidenced by statements in *Arroyo v. United States* (1959), 359 U. S. 419, 420, and in *Association v. Westinghouse Elec. Co.* (1954), 348 U. S. 437 n. 2.

Congress has amended Section 302 only once—in 1959—to approve apprenticeship programs, indicating that prior judicial decisions imposing a restriction on joint labor-management funds were within the legislative intent.

The trade promotion program held invalid by the courts below is within the letter and the spirit of the ban of Section 302. Trade promotion is a vague term. It has no specific standards, and the scope of permissible activity is difficult to define. There is not that specificity of definition and purpose found in trust funds expressly permitted by Section 302.

Assuming that the trade promotion program is not within the intent of Section 302, the final determination of that fact and amendment of the exemptions from Section 302 should be left to Congress.

Apropos here is the observation of the Court of Appeals for the Second Circuit in rejecting a suggestion that that court ignore the language of a tax statute to achieve what one of the litigants considered "a more just result." The court said:

> "Such a remaking of the legislation would require consideration of questions of legislative policy bearing on fiscal and economic matters and on administrative convenience; to discharge that task efficiently we would be obliged to hold a sort of Congressional Committee hearing, at which all interested persons would be heard, so as to be sure that our amendments would not entail unforeseen and undesirable results. We have no power to embark on such an enterprise."
>
> *Commissioner v. Beck's Estate* (2 Cir. 1942), 129 F. 2d 243, 246.

The court below correctly held that any change in Section 302 should emanate from Congress.

II.

The Trust and the Corporation Were Representatives of Employees.

Both the trusts and the corporation were established as a result of the collective bargaining agreement and were financed by employer contributions based on hours worked by employees. The trustees and directors were elected or at least designated by the unions and were known as labor trustees or directors. [R. 204-205; 206.]

To state that the persons so designated were not representatives of the employees because they were now "trustees" or "directors" would lead to easy evasion of Section 302.

In the *Ryan* case at page 301, the Supreme Court pointed out that the term "representative" as used in Section 302 is not a technical term. The relationship between the union and the designee must be examined. The Court said (p. 304):

> ". . . A narrow reading of the term 'representative' would substantially defeat the Congressional purpose. . . .
>
> "Payments made directly to union officials or to other individuals as trustees, would apparently be excluded from Section 302. Thus a narrow construction would frustrate the primary intent of Congress."

The trustees and directors were representatives of the employees. To decide otherwise would reduce Section 302 to a "practical nullity". *United States v. Ryan* at page 306.

III.

Review by the Supreme Court Is Not Warranted.

Although the precise narrow issues pressed by Petitioners may not have been decided in any case prior to this one, the issues were determined by implication in other cases. There is no conflict among the circuit courts. Some of the appellate cases which have decided the legal issues involved here are:

Arroyo v. United States (1959), 359 U. S. 419;

United States v. Ryan (1956), 350 U. S. 297;

Gibas v. United States (7 Cir. 1962), 300 F. 2d 836, cert. denied 371 U. S. 817 (October 8, 1962);

Sheet Metal Contractors Association v. Sheet Metal Workers International Association (9 Cir. 1957), 248 F. 2d 307, cert. denied 355 U. S. 924 (1958);

Brennan v. United States (8 Cir.), 240 F. 2d 253, cert. denied 353 U. S. 931 (1957);

Employing Plasterers Association of Chicago v. Journeymen Plasterers Protective and Benevolent Society of Chicago (7 Cir. 1960), 279 F. 2d 92;

Mechanical Contractors Association of Philadelphia v. Local Union 420 (3 Cir., 1959), 265 F. 2d 607;

Conditioned Air & Refrigeration Co. v. Plumbing & Pipe Fitting Labor-Management Relations Trust (D. C. Cal. 1956), 159 Fed. Supp. 887, aff'd per curiam, 253 F. 2d 427.

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition for a writ of ceritorari should be denied.

Respectfully submitted,

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